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In the Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA HOSPITAL ASSOCIATION, ET AL., PETITIONERS

v.

PATRICK W. HENNING, LABOR COMMISSIONER, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Department of Labor's "payroll practices" regulation, which defines the term "employee welfare benefit plan" in the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. II) 1001 *et seq.*, to exclude arrangements for granting employees paid vacation leave out of an employers' general assets, is a permissible construction of the statute.

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INTEREST OF THE UNITED STATES

This case concerns the validity of a Department of Labor regulation defining the scope of coverage of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. II) 1001 *et seq.* The regulation (29 C.F.R. 2510.3-1(b)), identifies certain "payroll practices," such as paid vacation, holiday, and sick leave, as outside the scope of "employee welfare benefit plans" covered by the statute. The district court in this case concluded that the payroll practices regulation is invalid. The Department of Labor participated as an amicus curiae in the court of appeals, which reversed the decision of the district court and upheld the Department's construction of ERISA as inapplicable to routine vacation leave arrangements. Since the Secretary of Labor is charged with enforcing the reporting and disclosure and the fiduciary obligations that Title I of ERISA imposes on employee

benefit plans covered by the Act, he has a substantial interest in the interpretation of ERISA's coverage and definitional provisions. The Secretary also has a substantial interest in defending the interpretation and application of the Department's regulation in this case.

STATEMENT

1. California, by statute, requires that when an individual's employment terminates before the employee has taken paid vacation leave provided under an employer policy, "all vested vacation shall be paid * * * as wages at [the employee's] final rate" (Cal. Lab. Code § 227.3 (West Supp. 1986)). The statute forbids the forfeiture of vested vacation time upon termination of employment. *Ibid.* Construing these provisions, the California Supreme Court has held that a proportionate right to paid vacation "vests" as labor is rendered. See *Suastez* v. *Plastic Dress-Up Co.*, 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982). Respondent, the California Labor Commissioner, is responsible for administering the state vacation wage law. In September 1982, he issued a policy memorandum explaining that under the statute, as interpreted in *Suastez*, "an employee who is terminated or who terminates before an eligibility date for vacation pay, is entitled to pro rata vacation pay for time served up to the date of termination" (Pet. App. G1-G2).

Petitioners – various California trade associations – and many of their employer members have established vacation leave policies that provide for the payment of compensation out of the employers' general assets while employees are on vacation. Contrary to California law, however, the policies forbid payment of prorated vacation pay and require the forfeiture of vacation pay accumulated by employees who are not actively employed on a specified eligibility date, typically the anniversary of hire (Pet. App. B2).

2. Petitioners brought suit in the United States District Court for the Central District of California seeking to enjoin the California Labor Commissioner from enforcing the state law against the Associations and their members. Arguing that their vacation leave policies fell within ERISA's definition of the term "employee welfare benefit plan" as "any plan, fund, or program * * * established or maintained by an employer * * * for the purpose of providing * * * *vacation benefits*" (29 U.S.C. 1002(1) (emphasis added)), they sought a declaration that Section 514(a) of ERISA, 29 U.S.C. 1144(a), preempted California's vacation wage law as applied to their practices. The district court accepted the Association's argument based on what it considered to be the "plain language" of the statute. In so doing, it expressly rejected a Department of Labor regulation (29 C.F.R. 2510.3-1(b)) which interpreted the definition of "employee welfare benefit plan" to exclude certain unfunded "payroll practices," including the "[p]ayment of compensation, out of the employer's general assets, * * * while an employee is on vacation or absent on a holiday * * *." The court concluded that "[i]f that regulation does indeed intend ERISA exemption of every unfunded vacation program, it is at clear odds with the language of the statute itself and an invalid arrogation of power by the Department" (Pet. App. C7-C8).

3. The United States Court of Appeals for the Ninth Circuit reversed (Pet. App. B1-B21). Contrary to the district court's decision, the court of appeals found that the term "plan * * * providing vacation benefits" in the statutory definition of "employee welfare benefit plan" has "no precise and immutable meaning" (*id.* at B5). The court held that it is "a reasonable and permissible construction of the statute to exclude from its coverage, as [29 C.F.R. 2510.3-1(b)] does, programs providing for the traditional vacation during which the employee continues

to receive ordinary wages paid from the general assets of the business" (Pet. App. B6). The court determined that the regulation reasonably distinguishes between "wage" compensation in the nature of cash wages or other analogous payments such as paid vacation leave made during the period of employment, which ERISA does not cover, and deferred "benefit" compensation, which Congress sought to regulate through the statute (*id.* at B8, B10-B11).

The court rejected petitioners' argument that because ERISA generally covers unfunded benefit plans, unfunded vacation payments must also be covered by the statute. In this regard the court found that nothing in the statute or its legislative history suggests that Congress intended ERISA to regulate routine vacation leave payments when made from an employer's general assets (Pet. App. B7, B18-B19). Coverage of such arrangements would not provide redress for the two principal abuses addressed by ERISA: mismanagement of funds accumulated to finance benefits and failure to pay employees the benefits promised. Thus, because vacation "[w]ages are ordinarily paid in cash out of the resources of the business * * * [t]here is no fund to administer and no special risk of loss or nonpayment" (*id.* at B7). Accordingly, the court explained that the Department's interpretation that paid vacation leave arrangements are not covered by the statute "is not based on the funded/unfunded distinction alone, however, but also on the wage/benefit compensation distinction" which inheres in the statute (*id.* at B18).

Finally, the court concluded that ERISA coverage of routine vacation leave arrangements would impose "a substantial and needless burden upon employers and the federal courts" since ERISA requires employers to comply with numerous statutory requirements and permits an employee claiming denial of vacation leave to sue the employer in federal court (Pet. App. B11-B12).

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other federal court of appeals. Review by this Court is therefore unwarranted.

1. a. Congress sought through ERISA to protect the interests of participants and beneficiaries of employee benefit plan[s] "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts" (29 U.S.C. 1001(b)). Coverage of the statute extends, with certain exceptions not applicable here, to any employee benefit plan established or maintained by an employer in interstate commerce (29 U.S.C. 1003). The "employee benefit plan[s]" covered by the statute encompass both "pension benefit plan[s]" and "welfare benefit plan[s]" (29 U.S.C. 1002(3)). Section 3(1) of ERISA defines "employee welfare benefit plan" or "welfare plan" as "any plan, fund, or program * * * established or maintained * * * for the purpose of providing * * * (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or *vacation benefits* * * * or (B) any benefit described in section 186(c) of this title * * *."[1] 29 U.S.C. 1002(1) (emphasis added).

The statute does not define the term "vacation benefits." Contemporaneous with the passage of ERISA, and in response to "numerous inquiries" concerning coverage of various forms of general asset compensation, however, the

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[1] The cross-reference is to Section 302(c) of the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 186(c), which describes, in addition to many of the same benefits enumerated in the ERISA definition, "pooled vacation, holiday, severance or similar benefits * * *." See 29 U.S.C. 186(c)(6).

Department of Labor promulgated regulations construing the definition of "employee welfare benefit plan" to exclude certain types of "payroll practices" including the "[p]ayment of compensation, out of the employer's general assets * * * while an employee is on vacation or absent on a holiday * * *." 29 C.F.R. 2510.3-1(b)(3); 40 Fed. Reg. 24642 (1975) (proposed regulations); 40 Fed. Reg. 34526 (1975) (final regulations). Based on the purposes and legislative history of the statute, and given the "substantial and needless burden" that would be imposed under the position urged by petitioners, the court of appeals correctly upheld the regulation as a "reasonable and permissible" construction of the statute. In reaching this conclusion the court below properly accorded the regulation "persuasive weight because it was formulated contemporaneously with the passage of ERISA" by the agency charged with administering the statute (Pet. App. B4). See also 29 U.S.C. 1135 (authorizing the Secretary of Labor to promulgate "necessary or appropriate" regulations and to define "technical and trade" terms used in Title I of ERISA). As the court correctly held, in these circumstances the appropriate standard of review for regulations interpreting an ambiguous statutory provision is " 'whether the agency's answer is based on a permissible construction of the statute' " (Pet. App. B5) (quoting from *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council,* 467 U.S. 837, 843 (1984)).

b. Petitioners contend (Pet. 24-27) that 29 C.F.R. 2510.3-1(b) is "nonsensical" because it accords different treatment to "*identical* vacation benefit[s]" based "*solely* on whether the vacation benefits under those plans or programs are financed through a trust fund or through the employer's general assets." But, as the court of appeals correctly concluded (Pet. App. B5), the term "vacation benefits" has no plain meaning, and the Department's regulation reasonably distinguishes vacation "payroll

practices" from ERISA-covered "vacation benefits" based not only on the absence of a separate fund, but also primarily on the close affinity between paid vacation leave and ordinary cash wages.

As the court below recognized, the Department's payroll practices regulation gives effect to Congress's intent not to subject to federal regulation ordinary cash wages, such as traditional vacation leave, paid from an employer's general assets. Congress sought in ERISA to regulate the wide variety of fringe benefit programs that had developed as "a means of compensating workers in lieu of increased wages" as a result of wage freezes imposed during World War II and the Korean conflict. S. Rep. 93-127, 93d Cong., 1st Sess. 3 (1973), *reprinted in* 1 *Legislative History of the Employee Retirement Income Security Act of 1974,* at 587, 589 (Comm. Print 1976) (hereinafter cited as *Leg. Hist.*). In enacting ERISA, Congress was principally concerned with evidence of mismanagement of funds accumulated to finance such benefits and with failure to pay employees promised fringe benefits.[2] As the court of appeals pointed out, however, "[t]raditional vacations during which the employer continue[s] to pay the employees'

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[2] As this Court has acknowledged, "[o]ne of Congress' central purposes in enacting this complex legislation was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 374 (1980) (footnote omitted) (quoting from a statement by Senator Bentsen, *reprinted in* 3 *Leg. Hist.* 4793). See also, 120 Cong. Rec. 4279-4280 (1974) (statement of Rep. Brademas); *id.* at 4277-4278 (statement of Rep. Perkins); 119 Cong. Rec. 30003 (1973) (statement of Sen. Williams). Evidence before Congress also reflected abuses involving misuse and mismanagement of welfare and pension benefit funds. See, *e.g., Private Welfare and Pension Plan Legislation: Hearings on H.R. 1045, H.R. 1046, and H.R. 16462 Before the General Subcomm. on Labor of the House Comm. on Education and Labor,* 91st Cong., 1st & 2d Sess. 464, 470-472 (1970) (statement of George Shultz, Secretary of Labor).

regular wages present[] neither of the evils Congress intended to address" (Pet. App. B7). Since vacation wages, like other ordinary wages, are generally paid in cash from the employer's business resources, "[t]here is no fund to administer and no special risk of loss or non-payment" (*ibid.*).

The Department's interpretation of the statute to cover funded vacation payments is also consistent with the significant historical fact of which Congress was plainly aware that collectively bargained vacation benefit funds have historically been the practice in a number of industries, most notably construction and longshoring, where employees frequently do not work for the same employer throughout the year. See, *e.g., Franchise Tax Board* v. *Construction Laborers Vacation Trust,* 463 U.S. 1, 4 & n.2 (1983). It was certainly reasonable for the Department, in construing the term "vacation benefits" in ERISA, to keep in mind Congress' likely concern with these specialized funded vacation benefit programs.

c. The distinction between traditional cash wages and specialized forms of fringe benefit compensation also refutes petitioners' reliance (Pet. 32-38) on cases holding that unfunded plans providing severance pay and group health insurance benefits are covered by ERISA. While we agree with petitioners that the existence of a separate fund in not required for ERISA coverage of employee benefit plans, see, *e.g., Donovan* v. *Dillingham,* 688 F.2d 1367, 1372-1373 (11th Cir. 1982) (en banc), it does not follow that Congress intended ERISA to regulate all forms of general asset compensation. Indeed, in rejecting arguments that severance benefits should be considered "payroll practices" when paid from general assets, the courts in *Gilbert* v. *Burlington Industries, Inc.,* 765 F.2d 320, 326 (2d Cir. 1985), and *Holland* v. *Burlington Industries, Inc.,* 772 F.2d 1140, 1146 (4th Cir. 1985), expressly concluded that severance pay is distinguishable

from the types of general asset compensation identified in the payroll practices regulation because it occurs only after termination of employment, whereas the payroll practices regulation concerns types of compensation that are normally received during the course of employment.[3] Vacation leave payments are "easily analogized to ordinary wages" that ERISA was not intended to cover (Pet. App. B10, quoting *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503 (9th Cir. 1985)). Cf. *Abella* v. *W.A. Foote Memorial Hospital, Inc.*, 557 F. Supp. 482 (E.D. Mich. 1983), aff'd per curiam, 740 F.2d 4 (6th Cir. 1984) (accumulated paid sick leave provided during the term of employment is not the type of "benefit[] in the event of sickness" (29 U.S.C. 1002(1)) Congress intended ERISA to cover).[4] In contrast, severance pay is available only upon termination of employment and constitutes a specialized form of deferred compensation that Congress sought to regulate through ERISA.[5]

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[3] This Court has been asked to review the decisions in *Gilbert* (Nos. 85-441 and 85-460) and *Holland* (Nos. 85-929 and 85-944), and the Court has invited the views of the United States in *Gilbert*. As discussed in the government's submission supporting summary affirmance in that case, every court of appeals that has considered the question has concluded that an employer's unfunded severance pay policy is an employee welfare benefit plan covered by ERISA and the Department of Labor has consistently interpreted the definition of "welfare plan" to include such unfunded plans.

[4] Of course this analysis applies equally to holiday leave and to the other types of paid leave arrangements included in the "payroll practices" regulation. Petitioners are flatly wrong in their repeated assertions (Pet. 35, 36 & n.11) that the regulation illogically accords different treatment to holiday and vacation leave arrangements. In a single clause, the regulation identifies payroll practices consisting of "[p]ayment of compensation while an employee is on vacation *or absent on a holiday*" (29 C.F.R. 2510.3-1(b)(3)(i) (emphasis added)).

[5] The fact that the vacation wages at issue in this case were payable upon termination of employment does not matter. The distinction the Department made was between severance pay, which is always payable after termination of employment, and compensation, such as

Moreover, the court of appeals found that "[n]ot only would inclusion of routine vacations-with-pay within ERISA contribute nothing to solution of the problems Congress sought to solve, it would also impose a substantial and needless burden upon employers and the federal courts" (Pet. App. B11). As the court explained, employers would be required to formulate plans, establish procedures, give notices to employees, and file reports with the Department. See 29 U.S.C. 1022, 1024(a)(1) and (2)(A), 1024(b), 1026(a), 1133(1) and (2). And "[a]ny employee claiming denial of vacation leave could sue his employer in federal court" (Pet. App. B12). See 29 U.S.C. 1132(a). As the court below aptly concluded, "[i]t is unlikely Congress intended to create burdens of this magnitude without evidence of need, and without comment" (Pet. App. B12).

d. Petitioners argue against the distinction drawn by the regulation on the ground (Pet. 27-28) that it would permit an employer to avoid more "onerous" state laws simply by establishing a trust "overnight," funding it "with *one dollar,*" and "funnel[ing] all vacation benefit payments from its general assets through an otherwise hollow vacation benefit trust fund." This argument overlooks the safeguards that ERISA establishes for funded plans and, accordingly, the disincentive for engaging in such a scheme. While there is no requirement ab initio to set aside assets or otherwise fund a welfare benefit plan (see 29 U.S.C. 1081(a)(1)) once an employer undertakes to separately fund a plan, Section 403(a) of ERISA requires, with certain exceptions not applicable here, that "all assets of an employee benefit plan shall be held in trust by one or more [named] trustees" (29 U.S.C. 1103(a)). Thus, with

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wages, that usually is payable during the course of employment. While vacation payments are sometimes payable at the time employment is terminated, wages are sometimes payable then too, so vacation payments are not distinguishable from ordinary wages in that respect.

respect to any funded welfare benefit plan, there will be an independent trustee who is responsible, inter alia, for assuring that trust funds are collected and that participants and beneficiaries receive the benefits to which they are entitled. See 29 U.S.C. 1103(c)(1), 1104(a)(1) (imposing standards of trustee and other fiduciary conduct). Because welfare funds, like pension funds, must be held by independent fiduciaries operating under strict fiduciary duties, it is not true, as petitioners suggest, that the transfer of funds to an ERISA trust would contribute nothing to the protection of participants and beneficiaries of welfare benefit plans.[6]

Nor is there any merit to petitioners' related argument (Pet. 28) that Congress did not intend to permit employers in effect to choose ERISA coverage based on their choices

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[6] Petitioners mistakenly rely (Pet. 26) on Internal Revenue Service Private Letter Ruling 8335087 (June 1, 1983) for the proposition that an employer can establish a "hollow" vacation benefit trust under ERISA. This issuance, however, is limited to the tax consequences of particular circumstances involving a holiday and vacation benefit trust; it does not address the application or requirements of ERISA, and in any event "may not be used or cited as precedent." 26 U.S.C. 6110(j)(3). Moreover, the letter does not in any way sanction an empty trust as postulated by petitioners. It discusses an arrangement whereby a vacation and holiday benefit trust fund is deemed to be the statutory employer for purposes of income tax withholding under 26 U.S.C. 3401(d)(1), even though the common law employer responsible for funding the trust may also be authorized to act as an agent of the trust for tax withholding purposes in accordance with Rev. Proc. 70-6, 1970-1 C.B. 420. Under the described arrangement, the company agent would handle benefit payments and tax withholding through payroll administration, subject to periodic reimbursement from the trust, thereby reducing overall administrative costs. Even for tax purposes, however, the letter points out that such an arrangement is possible only where "[t]he Company irrevocably obligates itself to provide certain funds to the trust" and "the trust, not the Company, has legal control and responsibility over the funds." As we have shown, ERISA imposes strict fiduciary duties on trustees in these circumstances.

concerning the structure of the wage and benefit package offered to their employees. In ERISA, Congress neither mandated nor prohibited any particular type of benefits. The statute establishes requirements and sets minimum standards for existing plans, but leaves to employers the discretion to determine what benefits to offer. It is true that an employer who creates a trust to pay vacation benefits and separately funds it in advance thereby establishes a plan governed by the federal statute, whereas an employer who merely continues to make ordinary wage payments from general assets while employees are on vacation remains subject to state law. But, whether those structures are devised to avoid one or the other of the statutory schemes or, as is more likely, to respond to other business concerns, the employer's motives are irrelevant to the determination of ERISA coverage. Rather, coverage under the statute is determined from the objective facts concerning the plan.

e. Finally, petitioners argue (Pet. 45-51) that Congress intended to occupy the field of employee benefit plan regulation and thereby sought to protect multi-state employers from the burden of conflicting state regulation in this area. But, as the court of appeals incisively concluded, "federal exclusivity is a corollary of regulatory coverage, not an independent statutory goal, and the Secretary has reasonably concluded that Congress did not intend to regulate unfunded vacations-with-pay" (Pet. App. B15). See also *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 n.17 (1983) (state laws are preempted "only insofar as they relate to plans covered by ERISA"); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 nn.19, 20 (1981) ("ERISA's pre-emption clause exempts state laws relating to * * * plans that do not fall within the Act's coverage"). In short, the policies underlying ERISA's preemption provision "do not throw light on what matters Congress intended to cover by ERISA in the first place" (Pet. App. B15-B16).

2. a. Petitioners argue (Pet. 29-31) that the court of appeals' decision is inconsistent with the implicit holdings of this Court in *Massachusetts Mutual Life Insurance Co.* v. *Russell,* No. 84-9 (June 27, 1985), and *Shaw* v. *Delta Air Lines, Inc., supra,* that disability benefits funded from employers' general assets are governed by ERISA.[7] Coverage of the plans, however, was not an issue in *Russell* or *Shaw.* Accordingly, this Court had no occasion to consider the applicability of the payroll practices regulation or otherwise to discuss the legal principles that apply to questions of ERISA coverage. Nor does it appear that the facts in those cases were developed sufficiently to permit meaningful consideration of the question.[8] Indeed, the Court in *Shaw* limited its decision in a manner consistent with the payroll practices regulation, noting that since

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[7] The payroll practices regulation excludes the payment of short-term salary continuation payments on account of disability from coverage under ERISA by providing that "welfare plan" does not include "[p]ayment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties" (29 C.F.R. 2510.3-1(b)(2)).

[8] In *Shaw,* the plaintiff employers alleged only in general terms that they maintained various types of employee benefit plans which were "funded and administered in several different ways." See *Delta Air Lines, Inc.* v. *Kramarsky,* 650 F.2d 1287, 1307, modified, 666 F.2d 21 (2d Cir. 1981), aff'd in part and rev'd in part *sub nom. Shaw* v. *Delta Air Lines, Inc.,* 463 U.S. 85 (1983). The plaintiff in *Russell* sought benefits under both a short-term salary continuation program and a long-term disability benefits plan. Her employer initially granted benefits for a period of five months, then terminated benefits for 132 days, and finally reinstated her benefits retroactively (slip op. 1-2). Contrary to petitioners' contentions (Pet. 30 & n.6), however, it is not clear that her claims involved only short-term salary continuation, a type of general asset compensation that would be excluded from ERISA coverage under the payroll practices regulation (see note 7, *supra*). The decisions in *Russell* simply do not reflect what type of benefits were provided by the employer's disability plan.

ERISA preempts state laws only to the extent that they relate to covered plans, the state law at issue "would be unaffected insofar as it [regulates] * * * hiring, promotion, *salary,* and the like" (463 U.S. at 97 n.17 (emphasis added)).

b. Petitioners also contend (Pet. 31-32) that the court of appeals' decision is in "direct conflict" with the decision of the Sixth Circuit in *Blakeman* v. *Mead Containers,* 779 F.2d 1146 (1985). In *Blakeman,* the Sixth Circuit concluded without discussion that the severance and vacation pay plans at issue were covered by ERISA and accordingly held that the participants' state common law contract claims for benefits under those plans were preempted by the federal statute. The *Blakeman* decision, however, does not reflect whether the vacation benefit plan at issue was separately funded. Nor did the Sixth Circuit cite, let alone discuss the applicability of, the payroll practices regulation. Petitioners assert a conflict based upon an unexplained "but see" citation to the court of appeals' decision contained in a footnote to the *Blakeman* opinion. See 779 F.2d at 1149 n.2. Given the Sixth Circuit's approval of the payroll practice regulation in *Abella,* 740 F.2d at 5, and in the absence of any discussion or analysis of the coverage issue, the court's decision cannot be viewed as necessarily in conflict with the decision below.

c. Petitioners further argue (Pet. 38-41) that review is warranted because the decision below conflicts with the decision of the Massachusetts Supreme Court in *Barry* v. *Dymo Graphic Systems, Inc.,* 394 Mass. 830, 478 N.E.2d 707 (1985). In *Barry* the court followed the ruling of the district court in this case and held that an unfunded vacation pay arrangement is a welfare benefit plan under ERISA. The court rejected the opposite conclusion because of its misconception that to do so "would cause the incongruous result of allowing an employer to avoid the broad scope of ERISA coverage by adopting a plan which ignores the fiduciary responsibilities required under

ERISA." 478 N.E.2d at 713. But, as the very case it relied upon, *Dillingham,* 688 F.2d at 1372, makes clear, compliance or noncompliance with ERISA's fiduciary obligations "are not prerequisites to coverage under the Act." Moreover, the *Barry* court focused exclusively on the funded/unfunded distinction and did not direct itself to the wage/benefit distinction asserted in the regulation and found critical by the Ninth Circuit in overruling the district court in the instant case. Given these considerations, and the fact that the *Barry* court did not have the benefit of the Ninth Circuit's well-reasoned decision, we do not believe that the conflict between *Barry* and the instant case warrants further review.[9]

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[9] The decision here is also in accord with the decisions of other courts that have agreed with the Department that routine paid vacations (and other common forms of paid leave) are properly excluded from coverage by the regulation. See *Abella,* 740 F.2d at 5; *National Metalcrafters* v. *McNeil,* 602 F. Supp. 232, 236-237 (N.D. Ill. 1985), aff'd on other grounds, 784 F.2d 817 (7th Cir. 1986); *Richardson* v. *St. Mary Hospital,* 6 Kan. App.2d 238, 627 P.2d 1143 (1981); but see *James* v. *T.G. & Y. Stores Co.,* No. 85-0113 (W.D. La. May 13, 1985) (Pet. App. H1-H8); *Holland* v. *National Steel Corp.,* No. 83-0033-W(M) (N.D. W.Va. June 10, 1985) (Pet. App. I1-I10).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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